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In the Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, ET AL., PETITIONERS

v.

HERBERT M. COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys
Department of Justcie
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a minority group's consistent ability to elect one representative of choice to a city council elected under an at-large voting system is necessarily sufficient to defeat a challenge to that system under Section 2 of the Voting Rights Act, when the minority group would have the opportunity to elect at least two representatives if the council were elected from fairly drawn single-member districts.

2. Whether an at-large electoral system, in which a minority group has the opportunity to elect candidates of its choice who are not members of the minority group, but the minority group has no opportunity to elect candidates of its choice who are members of the minority group, may be in violation of Section 2 of the Voting Rights Act.

3. Whether the court of appeals erred in reversing as clearly erroneous the district court's finding that no special circumstances explained the election of several black-preferred candidates to the City Council in Norfolk after this litigation was filed in 1983.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The City of Norfolk, Virginia uses an at-large system to elect its city council. The council has seven members who serve staggered four-year terms. Elections are held every two years, with three seats open one election year and four the next. Candidates run for all open seats, and the three (or four) candidates with the most votes win. Voters may vote for as many candidates as there are open seats, but they may also vote for fewer. Pet. App. 3a-4a, 42a.

Blacks constitute 35% of Norfolk's population and 31% of its voting age population (Pet. App. 4a). Until 1968, all members of the council were white (*ibid.*). A black was elected that year, and there has been at least

one black on the council ever since (*id.* at 4a-5a). Between 1970 and 1982, black candidates running in four elections in which the black incumbent was either not up for election or was himself also running for reelection received a majority of votes from black voters and lost (*id.* at 16a). In 1984, after this suit was filed, a second black, Foster, was elected, and two blacks have served on the council simultaneously since then (*id.* at 5a). Since 1968, two whites—Howell and Staylor—have been elected to the council with majority black support (Pet. 4). Howell was elected three times with majority black support; Staylor was elected once (*ibid.*).

2. Plaintiffs are seven black citizens of Norfolk and the Norfolk Branch of the NAACP (Pet. App. 2a). In 1983, they filed this suit alleging that the at-large method of electing members to the city council denies black voters an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973 (Pet. App. 2a, 3a n.2).

After a trial, the district court ruled for the City of Norfolk (Pet. App. 132a-193a), and the Fourth Circuit affirmed (*id.* at 114a-131a). This Court vacated and remanded to the Fourth Circuit for reconsideration in light of *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) (Pet. App. 113a). In *Gingles*, this Court held that there are three preconditions to a finding that an at-large system violates Section 2: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * * —usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. The Fourth Circuit in turn remanded the case to the district court to decide these issues (Pet. App. 99a-112a).

3. The district court once again ruled in favor of Norfolk (Pet. App. 38a-98a). It found Norfolk's black population sufficiently large and geographically compact to constitute an effective voting majority in two single-member districts (*id.* at 51a). The court also found that Norfolk blacks are politically cohesive (*id.* at 52a). The court found, however, that whites voting as a bloc are not usually able to defeat minority-preferred candidates (*ibid.*). In reaching this conclusion, the court relied on evidence that, since 1968, 11 of the 19 candidates receiving majority black support have won (*id.* at 66a-67a). The court also cited evidence that, at all times since 1974, at least two members of the council have been supported by a majority of black voters (*id.* at 68a).

The court rejected plaintiffs' contention that black voters did not actually favor Howell and Staylor since far more blacks voted for competing candidates than for them (Pet. App. 70a-72a). The court found it more significant that a majority of blacks voted for Howell and Staylor, that the most influential black civic group endorsed them, and that some black candidates received less black support than they did (*ibid.*).

The district court also rejected plaintiffs' assertion that only special circumstances allowed Foster to win a second black seat in 1984 (Pet. App. 76a-79a). The court acknowledged that the Mayor had both endorsed Foster and publicly stated that his election might moot this case (*id.* at 76a). The court also noted that a civic group with which the Mayor was affiliated supported only two candidates (not including Foster) when three seats were vacant (*id.* at 78a; see also *id.* at 18a). The court found, however, that these events had not produced unusual white support for Foster (*id.* at 76a-79a). The court relied on evidence that the Mayor's decision to support Foster had predated the lawsuit (*id.* at 77a). It also cited evidence that other black candidates, including one who ran in 1984 without the Mayor's endorsement, had obtained approximately the same level of white support as Foster did in 1984 (*id.* at 77a-78a).

Finally, the court rejected plaintiffs' contention that the reelection of black incumbents should be attributed to the special advantages of incumbency (Pet. App. 80a). The court found that incumbency was not critical to black success since nonincumbents supported by a majority of black voters have also won (*ibid.*).

4. a. A divided panel of the court of appeals reversed. It agreed with the district court that Norfolk blacks are sufficiently compact to constitute a voting majority in at least two single-member districts and that they are politically cohesive (Pet. App. 9a). It held that the district court had erred, however, in finding the absence of legally significant white bloc voting.

The court concluded that the district court's error stemmed in part from its finding that Howell and Staylor were minority-preferred candidates (Pet. App. 9a-15a). The appellate court held that Howell's and Staylor's receipt of significantly less minority support than competing candidates created a presumption that they should not be considered minority-preferred (*id.* at 9a-10a). The evidence cited by the district court, the Fourth Circuit explained, was insufficient to show that black voters preferred Howell and Staylor over these other unsuccessful candidates (*id.* at 11a). The court also concluded that the district court's finding could not be reconciled with the evidence that the black community did not view Howell and Staylor as their representatives and the evidence that Howell and Staylor did not promote issues of concern to the minority community (*id.* at 11a-13a).

The court of appeals then proceeded to address the significance of white bloc voting, with Howell and Staylor no longer counted as minority successes. The court found that while black voters have achieved sustained success in electing one representative, "this case involves the community's inability to elect a second member until after the institution of this action" (Pet. App. 15a). For this reason, the court explained, the statistics showing that just over half of the black-supported candidates

have won election since 1968 are misleading (*ibid.*). To use such statistics to defeat this action, the court concluded, would place "a stamp of approval on token representation" (*ibid.*).

To avoid this result, the court held that the inquiry into whether white bloc voting can usually defeat minority-preferred candidates should be applied to the black community's effort to obtain a second seat (Pet. App. 15a). Applying this analysis, the court found that all black-supported candidates for a second seat between 1968 and 1984 were defeated and that this demonstrated legally significant white bloc voting (*id.* at 16a).

A second black—Foster—was elected to the council in 1984, but the court held that this did not undermine its conclusion (Pet. App. 17a-20a). The court concluded that the Mayor's unprecedented support for a second black, his statement that the election of a second black might moot the case, and the civic coalition's endorsement of two candidates for three vacancies (leaving a more open field for Foster) showed that special circumstances accounted for Foster's success (*id.* at 18a). The court held that the district court's finding that these events had not elicited unusual white support was based on its mistaken reliance on a comparison between the amount of white support received by Foster and the amount received by previous black candidates for the *first* seat (*id.* at 18a-19a). According to the court of appeals, Foster's white support should have been compared to that of previous second-seat candidates; when this comparison was made, it became clear that Foster's share of the white vote (26.6%) was nearly twice that of the next highest black second-seat candidate prior to 1984 (14.0%) (*id.* at 19a). That another black candidate in 1984 received almost as much white support as Foster, the court concluded, reinforced the inference that this litigation had produced unusual white support for black candidates (*ibid.*).

The court also concluded that the ability of black voters to retain two blacks on the council in 1986 and 1988 resulted from special circumstances (Pet. App. 21a). The court attributed the success of black candidates in these elections to the pendency of this litigation and to the candidates' incumbency (*ibid.*).

b. Judge Chapman dissented. He agreed with the district court that Howell and Staylor were minority-preferred candidates (Pet. App. 23a-29a). The relevant question, according to Judge Chapman, was whether "the elected candidate can be *fairly* considered as a representative of the minority community and not whether such candidate is the 'most preferred'" (*id.* at 24a (emphasis in original)). Judge Chapman noted that the candidates' positions on issues of concern to the minority community "has nothing to do with vote dilution" (*id.* at 26a), and that he would give "little weight" to testimony that Howell and Staylor were not viewed as representatives of the black community (*ibid.*). Judge Chapman was also convinced that the panel's treatment of Howell and Staylor was at least implicitly related to an assumption that a candidate's race is an important factor in determining whether he is minority-preferred (*id.* at 25a-26a).

Judge Chapman further concluded that even if Howell and Staylor are not counted as minority-preferred candidates, plaintiffs failed to prove legally significant racial bloc voting (Pet. App. 30a-34a). In Judge Chapman's view, the majority improperly embraced proportional representation as a Section 2 requirement in focusing on whether blacks have achieved success in electing a second representative (Pet. App. 30a). Judge Chapman would have applied the test of usual defeat to all contests, not just to those for the second seat (*id.* at 33a). Applying this standard, Judge Chapman found that, even excluding Howell and Staylor, over half of the minority-supported candidates have been elected to office since 1968 (*id.* at 34a).

Judge Chapman also found that Foster's election in 1984 did not result from special circumstances (Pet. App. 34a-36a). In concluding otherwise, Judge Chapman stated, the majority had improperly restricted the comparison of Foster's white support to that of blacks who ran for the second seat (*id.* at 35a). In Judge Chapman's view, this comparison shares the same error as the panel's inquiry into whether blacks are able to elect someone to a second seat: it effectively establishes a right to proportional representation (*ibid.*). When compared to all black candidates, Judge Chapman noted, Foster's white support was not unusual. Beyond that, Judge Chapman concluded, the evidence that the level of white support for another black candidate in 1984 was comparable to the level of white support for Foster shows that the Mayor's endorsement of Foster did not produce unusual support for him (*ibid.*).

Finally, Judge Chapman concluded that the election of black incumbents should not be discounted as a special circumstance (Pet. App. 36a-37a). Judge Chapman read the panel as holding that when incumbents are successful and nonincumbents are not, incumbency is necessarily a special circumstance (*id.* at 36a). In Judge Chapman's view, this reasoning would turn virtually every election into one involving special circumstances (*ibid.*).

c. The court of appeals denied rehearing en banc by an equally divided vote (Pet. App. 197a).

DISCUSSION

Despite racially polarized voting patterns, black voters in Norfolk have repeatedly elected at least one representative of their choice to the city's seven-member council. The court of appeals determined, however, that black voters do not have an opportunity—absent special circumstances—to elect a second representative. Because blacks would have the potential to elect two representatives under a fairly drawn single-member district plan, the court of appeals held that the City's use of an at-

large election system dilutes black voting strength in violation of Section 2.

Petitioners contend that the court of appeals' inquiry into whether black voters have an opportunity to elect a second representative is inconsistent with *Gingles* and implicitly treats the absence of proportional representation as a violation of Section 2. They also argue that the Howell and Staylor elections and the post-lawsuit elections show that black voters not only have an opportunity to elect two representatives of their choice, but have in fact done so. Finally, they argue that the totality of the circumstances demonstrate the absence of a Section 2 violation.

These contentions, while serious, do not warrant this Court's review. Although the court of appeals' analysis is not without flaws, the court's errors, we believe, either do not affect the outcome of the case or are too closely tied to its particular facts to be of general significance. Moreover, there is no conflict among the circuits on the specific issues presented in this case. The petition for a writ of certiorari should therefore be denied.

That said, we would be remiss in failing to note that, as a general matter, the courts of appeals appear to be experiencing considerable difficulty in resolving a wide range of issues surrounding application of Section 2 of the Voting Rights Act to at-large election systems. See, *e.g.*, U.S. Amicus Br. in *Sanchez* v. *Bond*, petition for cert. pending, No. 89-353. It is not insignificant that, in addition to the Fourth Circuit in this case, another circuit has recently divided evenly en banc in such a case. *Solomon* v. *Liberty County*, No. 87-3406 (11th Cir. Apr. 5, 1990); see also *Whitfield* v. *Democratic Party*, No. 88-1953 (8th Cir. May 4, 1990) (en banc court evenly divided on Section 2 challenge to majority vote requirement). For the reasons set forth in our amicus filings, we do not believe that either this case or *Sanchez* warrants this Court's review. At the same time, most voting rights cases are, by their nature, likely to be fact-

intensive; persistent confusion and division in the circuits—even on application of governing principles to particular facts—may well call for further guidance from this Court at an appropriate time.

1. a. The court of appeals properly inquired into whether black voters have an opportunity to elect a second representative. That inquiry is not premised on the notion that Section 2 requires proportional representation, as petitioners contend. It is instead premised on the notion that an at-large system in which the evidence shows that white voters are willing to elect no more than one representative who is the choice of black voters is not immune from Section 2 scrutiny. Any contrary rule would, as stated by the court of appeals, "place[] a stamp of approval on token representation" (Pet. App. 15a). For example, a 15-member city council elected at-large in a community with a geographically compact, 49% black population cannot be exempt from Section 2 scrutiny because a single black-preferred representative is consistently elected. In the terms of the statute, the fact that the black communiy can consistently elect a single council member would hardly prove that it has the same opportunity as the majority group "to participate in the political process and to elect representatives of [its] choice." 42 U.S.C. 1973(b).

The use of a fairly drawn single-member district plan as a benchmark for measuring the effect of an at-large system on minority voting strength is at the heart of *Gingles*. There, the Court held that "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect." 478 U.S. at 50 n.17. It follows from this holding that, where the minority group challenging an at-large electoral system has shown that it is unable to elect as many representatives as it could in fairly drawn single-member districts, and where the defendant has failed to rebut this showing, a Section 2 violation can be made out. Cf. *Gingles*, 478 U.S. at 90-91 (O'Connor, J., concurring in the judgment).

The use of a single-member district plan as the benchmark for measuring undiluted voting strength is far different from a proportional representation standard. As was explained in *Gingles*, "[This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." 478 U.S. at 51 n.17 (quotation marks and emphasis omitted). The Fourth Circuit has expressly recognized this distinction. See *McGhee* v. *Granville County*, 860 F.2d 110 (4th Cir. 1988) (rejecting a Section 2 challenge to a fairly drawn single-member district plan even though it afforded minority voters far less than proportional representation).

b. While the court of appeals properly sought to assess the opportunity of blacks to elect a second representative, it artificially narrowed its focus to contests for a second seat. A minority group's repeated success in electing one representative can be persuasive evidence that it fully participates in the electoral process and has an *opportunity* to elect a second representative as well. The force of this evidence is not necessarily dissipated by evidence that the minority group has been unsuccessful in actually *electing* a second representative. The lack of success could be explained by factors other than the unyielding resistance of whites to a second representative, such as the characteristics of a particular candidate or the circumstances surrounding a particular election. Because the court of appeals did not expressly consider all the evidence bearing on the opportunity of blacks to elect a second representative—including the unquestioned and consistent success of blacks in electing at least one representative to the council—its analysis of the "totality of circumstances" (42 U.S.C. 1973(b)) was incomplete.

It is unclear, however, that a more complete analysis would have affected the outcome of this case. The evidence shows that between 1970 and 1982, black voters made four unsuccessful attempts to elect a second black

to the council. These second-seat candidates received just 8% to 14% of the white vote, for an average of 11%. In contrast, black candidates for the first seat received between 22% and 32% of the white vote, for an average of 27% (Pet. App. 16a, 208a-217a). This wide and repeated disparity between white support for first-seat candidates and white support for second-seat candidates is significant evidence that black voters in fact did not have an opportunity to elect a second representative before the filing of this suit. Petitioners have pointed to nothing in the record about the characteristics of the second-seat candidates or the circumstances of these elections that adequately explains this white voting behavior, leaving the opposition of whites to a second black representative as the most persuasive explanation.

c. Petitioners contend that black voters have still elected more than half of their preferred candidates and that plaintiffs therefore failed to prove usual defeat as required by *Gingles*. This argument is misguided. Petitioners approach the usual defeat inquiry as if it involved nothing more than a strict mathematical count of past wins and losses, with more losses than wins being an essential element of plaintiffs' case. Petitioners' mathematical model, however, produces a distorted picture.

Under petitioners' method of calculating a minority group's opportunity to elect, there would be no violation as long as first-seat successes outnumber second-seat losses, regardless of whether the evidence undeniably shows that there is no opportunity to elect a second candidate. As the court of appeals explained, to accept such evidence as conclusive proof of the absence of a violation would "place[] a stamp of approval on token representation" (Pet. App. 15a). It *is* significant that blacks in Norfolk can elect a candidate of their choice to the city council. But there are seven members on the council, and if discriminatory voting patterns account for the inability of blacks to elect *more* than one candidate—

in the absence of special circumstances—then their success in electing *one* is no answer. If the political reality is that black voters have been relegated to a token seat, and that they have no real opportunity for increased representation, it would be inconsistent with the goals of Section 2 to mask this reality by melding first-seat and second-seat elections and concluding that there is no violation because blacks have won (consistently, for the first seat) more often than they have lost (consistently, for the second seat). Nothing in *Gingles* or common sense requires such a result.

To the contrary, as we have shown, the relevant inquiry under *Gingles* is whether blacks have an opportunity to elect a second representative. First-seat elections can inform that inquiry. When other evidence is more convincing, however, the first-seat elections can properly be discounted.

2. Petitioners contend, however, that the at-large election system does not limit black voters to token representation. In particular, they point to the elections of Howell and Staylor as evidence that blacks have elected at least two candidates of choice to the council since 1974. According to petitioners, the court of appeals plainly erred when it refused to find that Howell and Staylor were minority-preferred.

Gingles does not expressly address how to decide whether a candidate is minority-preferred. This Court's discussion of how to prove political cohesion, however, suggests the proper approach. One way to prove political cohesion, this Court held, is to show that "a significant number of minority group members usually vote for the same candidates." 478 U.S. at 56. This definition of political cohesion implies that there is no great mystery about how to identify minority-preferred candidates: they are simply those for whom a significant number of minority group members vote.

This is not to suggest that every candidate who receives more than 50% of the black vote is necessarily a candidate of choice. But Howell and Staylor did not receive bare majority support from blacks; black support for these white candidates ranged from almost 57% to approximately 73% (Pet. 4). Generally, support of these proportions should be sufficient to establish that a candidate has received bloc support and is therefore a candidate of choice.

The court of appeals concluded that Howell and Staylor were not minority-preferred primarily because competing candidates received a significantly higher percentage of the black vote and lost (Pet. App. 9a-15a). The court reasoned that black voters preferred these other candidates, rather than Howell and Staylor.[1] The flaw in this reasoning is that the candidates did not compete for only one position. Each election had at least three vacancies. Accordingly, blacks could potentially have had at least three candidates of choice. In these circumstances, it makes little sense to say that someone cannot be a candidate of choice solely because another candidate receives a significantly higher percentage of the black vote. In such multiple vacancy elections, if three candidates receive minority bloc support, it would generally seem fair to conclude that they are all candidates

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[1] Petitioners' contention (Pet. 16 n.20, 22) that the court of appeals' opinion "seems to incorporate the notion that black voters must achieve proportional representation with *black* candidates" (Pet. 22 (emphasis in original)) is mistaken. The court of appeals expressly refrained from deciding whether the race of the candidate is significant in determining who is a "candidate of choice" of the minority group. Pet. App. 8a n.7. In fact, as Judge Chapman recognized in his dissent, the panel did not object to counting Howell as a black-preferred candidate in one of her bids for election. See Pet. App. 24a-25a. Although the portion of the court's opinion addressing the Howell and Staylor victories (*id.* at 9a-15a) does seem to rest on the assumption (incorrect, in our view) that minority voters may have only one defeated candidate of choice in a multiple-seat election, it does not rest on the assumption (also incorrect, in our view) that any candidate of choice of minority voters must be a member of the minority group.

of choice. See *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (recognizing more than one minority-preferred candidate in multiple-seat election), cert. denied, 109 S. Ct. 3213 (1989).

We nonetheless believe that there were sufficient grounds for the court of appeals' conclusion that the elections of Howell and Staylor did not demonstrate the absence of a Section 2 violation. That is because, as previously discussed, there is a clear pattern of defeat of candidates who are black and ran for a second seat between 1970 and 1982; at best, the elections of Howell and Staylor show that the minority voters had the opportunity to fill the second seat with a candidate of their choice so long as that candidate was white.[2] As we have explained in our Brief as Amicus Curiae in *Sanchez* v. *Bond*, No. 89-353, while a candidate of choice of a minority group need not be a member of that group, an electoral system that restricts the opportunity of a minority group to elect candidates of choice who are members of the group violates Section 2 (Br. 13-14). Thus, while we do not embrace the court of appeals' reasoning on this issue, its ultimate conclusion that the Howell and Staylor elections do not suggest the absence of a Section 2 violation does not warrant this Court's review.

Contrary to the contention of petitioners, there is no conflict between the decision in this case and the result reached by the Fifth Circuit in *City of Gretna*. In *Gretna*, the Fifth Circuit held that a black candidate who received 67% of the black vote and lost was a minority-preferred candidate even though two competing white candidates who may have received 70% of the

[2] As explained above (p. 11), although black candidates for the second seat received an average of just 11% of the white vote, black candidates for the first seat received an average of 27% of the white vote. It is this decline in the white vote for second-seat black candidates—a decline for which petitioners offer no explanation—that made it impossible for such candidates to be elected between 1970 and 1982.

black vote won. 834 F.2d at 502 & n.14. The court further held, however, that the success of the two white candidates did not establish the absence of legally significant white bloc voting. The court explained that "[s]ignificance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." *Id.* at 502. As this discussion shows, the Fifth Circuit's result, although not its reasoning, is congruent with the result reached in this case; the success of blacks in electing white candidates to a second seat cannot rebut a clear showing that blacks have had no opportunity to elect black candidates to that seat.

3. Petitioners next contend that Foster's election in 1984 and the subsequent reelection of black candidates in 1986 and 1988 are sufficient to show that blacks enjoy an equal opportunity to elect candidates of their choice. This fact-bound contention does not warrant this Court's review.

a. Petitioners initially contend that the court of appeals' finding that this litigation produced unusual white support for Foster is based on an unduly restricted comparison to the white support for previous second-seat candidates. In petitioners' view, that analysis is premised on the same proportional representation standard that led the court to assess the opportunity of blacks to elect a second representative. For reasons already discussed, this criticism is misdirected. Given the propriety of the second-seat inquiry and the significant difference between white support for previous first- and second-seat candidates, the court of appeals properly compared Foster's white support to that of the previous second-seat candidates. Because Foster received significantly more white support than previous black second-seat candidates, the court plausibly viewed Foster's white support as unusual, and the district court's contrary finding as clearly erroneous.

This conclusion, however, does not exhaust the special circumstances inquiry. It is also necessary to determine whether this unusual support is an artifact of the pending litigation or whether it reflects a more permanent change in the political climate in Norfolk. The evidence on this issue is inconclusive. On the one hand, the evidence that no black candidate was elected to a second seat until after this suit was filed, together with the evidence that the Mayor publicly stated that the election of a second black might moot the case and the civic group's endorsement of only two candidates for the three open seats in 1984, suggest that Foster's unusual support was a product of the litigation. On the other hand, the evidence that the Mayor's support for Foster predated this suit, and that black voters have now elected and reelected two black representatives through three successive elections, suggest that a more permanent shift in the political climate may be at work. The rest of the evidence can plausibly support either inference (compare Pet. App. 19a with *id.* at 35a).

Accordingly, after identifying the district court's error in failing to treat Foster's support from white voters as unusual, a proper application of Rule 52 of the Federal Rules of Civil Procedure should have led the court of appeals to remand for a new finding on whether Foster's unusual support was caused by the litigation or reflected a more permanent shift in the Norfolk political climate. See *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Because the court of appeals purported to apply the clearly erroneous standard, however, and because the manner in which it did so does not have any importance outside of this case, the court of appeals' treatment of Foster's election does not warrant this Court's review.

b. For similar reasons, the question whether the court of appeals properly treated incumbency as a factor that contributed to the retention of two blacks on the council in 1986 and 1988 is not worthy of this Court's review. Under *Gingles*, incumbency is among the factors that

may justify a finding that the election of a minority-supported candidate is due to special circumstances. 478 U.S. at 57. The importance of incumbency in a particular case, however, is a factual issue governed by the clearly erroneous standard. Here, while it is plausible that the candidates' incumbency (along with the pendency of the litigation) explains the 1986 and 1988 ability of blacks to retain two seats on the council, it is equally plausible that blacks now enjoy an opportunity to elect a second representative of their choice to the council. They have, after all, done so in three successive elections. Accordingly, the court of appeals should not have substituted its judgment for that of the district court on this issue. Because this issue is so fact-bound and is unlikely to have any significance beyond this case, however, it too does not warrant this Court's review.[3]

4. Finally, petitioners contend that the court of appeals improperly reversed the district court's finding that the totality of the circumstances demonstrates the absence of a Section 2 violation. Here, however, the district court's ultimate finding depended on its treatment of the Howell, Staylor, and post-litigation elections. Once its findings on those elections were set aside, there was no longer any basis for the district court's ultimate finding. As petitioners contend (Pet. 28), this Court did not hold in *Gingles* that the only way a defendant may defeat a Section 2 claim is to show that one of the *Gingles* factors has not been proven. But in this case, petitioners point to no other circumstance that would justify a finding of

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[3] Petitioners contend (Pet. 27-28) that the court of appeals improperly treated all election successes involving incumbents as special circumstances elections. While there is some ambiguity on this point, we read the court's discussion of incumbency as limited to the ability of blacks to elect and retain a second representative on the council (Pet. App. 5a, 20a-21a). There is no other way to explain the court's finding (Pet. App. 15a) that "this action would border on the frivolous" if the claim could have been defeated by showing that blacks had "the ability to elect a single candidate to the council."

no violation.[4] Thus, petitioners' argument on this issue collapses into their arguments on the other issues. For the reasons already discussed, those contentions do not warrant this Court's review.

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[4] The *en banc* Eleventh Circuit has recently divided evenly concerning the relationship between a finding that the three *Gingles* factors were proven in a given case and an ultimate "totality of the circumstances" finding of a Section 2 violation. See *Solomon* v. *Liberty County*, No. 87-3406 (Apr. 5, 1990). The question that divided the Eleventh Circuit in *Solomon*, however, is largely irrelevant in this case. The *Solomon* court was unanimous in holding that a plaintiff can make out a Section 2 violation simply by proving the existence of the three *Gingles* factors. See slip op. 2599 (Kravitch, J., specially concurring), 2615 (Tjoflat, C.J., specially concurring). The court, however, was unable to agree on whether a defendant may rebut a showing of the existence of the three *Gingles* factors by showing that a neutral explanation, relying on objective factors, demonstrates that "the voting community is not driven by racial bias." *Id.* at 2616 (Tjoflat, C.J., specially concurring); see *id.* at 2593 n.3 (Kravitch, J., specially concurring). In this case, however, although petitioners generally assert (Pet. 28) that the Fourth Circuit did not give proper deference to the district court's "totality of the circumstances" finding, they do not assert that they proffered a neutral, non-racial explanation for the racially polarized voting in Norfolk, or that the Fourth Circuit, having found the existence of legally significant racially polarized voting, erred in failing to recognize that such voting in this case was not the result of racial bias. This case, therefore, does not raise the issue that divided the Eleventh Circuit in *Solomon*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys

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